

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Forbearance From)	
the Current Pricing Rules for)	WC 03-157
the Unbundled Network Element)	
Platform)	

**COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

On July 3, 2003, the Wireline Competition Bureau released a *Public Notice* seeking comment on a forbearance petition filed by the Verizon Telephone Companies (Verizon). The forbearance petition requests that the Federal Communications Commission (FCC) forbear “from its decision permitting UNE-P carriers to collect per-minute access charges from long distance carriers . . . and . . . from applying its current TELRIC pricing rules to the so-called UNE platform.” Petition at 1. The Pennsylvania Public Utility Commission (PA PUC) recommends denial of the petition because the standards for forbearance under the Telecommunications Act of 1996 (the Act) have not been satisfied. 47 U.S.C. § 160.

Standards for Forbearance

Congress requires that three conditions be met before Verizon's petition could be granted. First, the FCC must assure itself that the relevant pricing rules are "not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in conjunction with the telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160 (a)(1). Second, the FCC must determine that "enforcement of such regulation or provision is not necessary for the protection of consumers. § 160 (a)(2). Third, the FCC must determine that "forbearance from applying such provision or regulation is consistent with the public interest." § 160 (a)(3). The petition should be denied if the FCC finds that any one of the three prongs is unsatisfied. Cellular Telcoms & Internet Ass'n v. FCC, 330 F.3d 502, 509 (D.C. Cir. 2003).

Verizon's Request

The relief requested is somewhat ambiguous due the failure of the petition to cite to any specific provisions of the Act or regulations. It appears the scope of relief does not extend to any provision of the Act or to the FCC's regulation

providing for the availability of UNE-P itself. The limited scope appears to be forbearance from "current pricing rules" applicable to the UNE-P. Petition at 25.¹

Verizon proposes that Verizon—rather than the UNE-P carrier—be allowed to collect per-minute access charges from long distance carriers to “help pay for the cost of the underlying network infrastructure.” Petition at 4. Verizon also proposes that the compensation received for UNE-P “should be no lower than under the resale pricing standard prescribed by Congress (or at alternative rates a CLEC negotiates with the ILEC).” Petition at 14.

Verizon offers policy-based arguments in support of its petition.

Verizon’s Request Should be Denied Because the Forbearance Standards Have Not Been Met

Preliminarily, we take as a given that Verizon has a duty to offer UNE-P.²

Granting the petition could threaten the just and reasonable pricing of UNE-P, consumer protections and the public interest. The threat comes not from any belief that the FCC's TELRIC pricing methodology is the only appropriate

¹ Regulations are not cited, but certain FCC orders are. A fair reading of the petition suggest that the applicable regulations may be found in 47 C.F.R. Parts 51 (Interconnection) and 69 (Access Charges).

² If Verizon does not have a duty to offer UNE-P, then the petition is moot.

cost-based/non-rate of return based methodology.³ Rather, the threat comes from the void created if TELRIC does not apply to the price of UNE-P.

Verizon proposes that the price of UNE-P "should be no lower than under the resale pricing standard" or "at alternative rates a CLEC negotiates with the ILEC." Petition at 14. Both pricing proposals generate an intolerable level of uncertainty and could be administratively burdensome upon state commissions. We note that ease of administration and enforceability is a legitimate consideration in setting a standard for regulatory relief. WorldCom, Inc. v. FCC, 238 F.3d 449, 459 (D.C. Cir. 2001).

Reliance on Resale Rate is Problematic

Resale rates must be set based on costs that "will be avoided" rather than on costs that "reasonably can be avoided." Iowa Utils. Bd. v. FCC, 219 F.3d 744, 755-56 (8th Cir. 2000) (invalidating FCC's "reasonably can be avoided" standard). "[A] standard based on 'actually avoided' costs should focus on the costs avoided in sales made to the CLEC, while recognizing that the ILEC will continue other retail sales." MCI v. Bell Atlantic-Pa., 271 F.3d 491, 519-520 (3d Cir. 2001).

The PA PUC's existing resale rates for Verizon were established in 1997 pursuant to the then-existing FCC regulations. PA PUC v. Bell Atlantic, Order entered Feb. 6, 1997 at PUC Docket No. R-00963578 (establishing the wholesale

³ In pricing UNE-P, the Act requires that the price be "just, reasonable, and nondiscriminatory," 47 U.S.C. § 251(c), and, when the state commission determines the rate, to be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding)." 47 U.S.C. § 252(d).

discount for the resale of Bell's retail services at 18.43 percent with operator services and 20.69 percent without operator services, with an additional 5 percent discount for resellers agreeing to indemnify Bell for the applicable Pennsylvania gross receipts tax). The rates were reviewed in 1999 and not changed.

In the wake of the invalidation of the FCC regulations, and in the course of litigation over the existing rates, the PA PUC has consented to a new proceeding for the purpose of establishing resale rates that comply with the "will be avoided" requirements. This proceeding was recently initiated at PUC Docket No. R-00038516 and is in its earliest stages. Since the FCC has not promulgated an "avoided cost" methodology, it will be up to the PA PUC to develop one.

At this time, it is not known what the resale rates will be. All that might be ventured is that the forthcoming new rates are likely to fall somewhere between the existing retail rates at one extreme and the existing resale rates at the other extreme. Even then, this is not a certainty. The outcome will depend upon the record developed in the proceeding.

Uncertainty about the resale rate necessitates rejection of Verizon's proposal to use a resale rate benchmark to price UNE-P instead of TELRIC. It simply cannot be determined at this time whether the resale rate is a just and reasonable basis for pricing UNE-P.

Reliance on a Expectation of a Negotiation to Set Rate is Problematic

There is no need to grant the petition in order to allow a negotiated rate for UNE-P. Negotiated rates are already permitted. 47 U.S.C. § 252(e)(2). The

question is what pricing rules apply if the attempted negotiation is unsuccessful. This is a critical question to state commissions as they will be asked to determine a price in arbitration proceedings. 47 U.S.C. § 252(c).

An inadequacy of Verizon's petition is that it does not address what pricing standards the state commission would use, other than suggesting use of the resale rate benchmark. As explained above, uncertainty on what a resale rate benchmark is could lead to unintended consequences if the benchmark is adopted. Presently, TELRIC is the only pricing methodology affirmed to be lawful under the Act. Verizon Communs., Inc. v. F.C.C., 535 U.S. 467 (2002).

If TELRIC does not apply,⁴ a state commission could interpret the Act and develop another lawful methodology. But, this would require a complex state commission proceeding and likely result in lengthy litigation. Moreover, the outcome of such proceeding cannot be predicted. While a the state commission could be expected to establish a "just, reasonable and non-discriminatory" price, it is impossible at this time to know whether the exercise of the state commission's independent judgment based upon the record evidence would produce a UNE-P rate that is higher or lower than the TELRIC rate. All of this uncertainty forecloses any possibility of determining that consumers will be protected and the public interest not harmed at this stage of market development.

⁴ See 47 U.S.C. § 160(e) (prohibiting state application of "any provision of this Act" that the FCC has determined to forbear from applying).

Access Charge Recovery

The petition is an inadequate basis upon which to grant relief concerning access charges. A determination on the access charge portion of Verizon's petition should include an analysis of whether TELRIC allows Verizon to recover the access charge related costs that Verizon claims it is entitled to recover. The petition is devoid of any such analysis. The petition also does not address what, if any, impact there would be on intrastate access charges. Such deficiencies should be corrected before any relief is seriously considered in order to ensure a rational determination.

Verizon's Policy Arguments

The PA PUC does not take any position on Verizon's policy arguments concerning UNE-P, TELRIC and interstate access charges. The PA PUC does not oppose consideration of the arguments. But, now is not the time and place for such consideration. See NARUC Resolution on Verizon Forbearance Petition (2003 Summer Meeting) (recommending consideration in the context of a triennial review proceeding or other generic proceeding).⁵

⁵ Available at <http://www.naruc.org/Resolutions/2003/summer/telecom/verizon.shtml> (site visited August 8, 2003).

Conclusion

For all the forgoing reasons, the petition should be denied.

RESPECTFULLY SUBMITTED,

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